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In the Supreme Court of the United States

CHEVRON U.S.A., INC., PETITIONER,

v.

MARIO ECHAZABAL, RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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In furtherance of a campaign against "paternalism" that would force employers to hire disabled persons for jobs that will seriously harm or kill them—an agenda Judge Trott described as "bizarre" and at odds with numerous "statutes and rules" designed to assure worker safety—respondent asks this Court to engage in an unprecedented mode of statutory interpretation. Echazabal urges the Court to override the ADA's unambiguous statutory language, which shows that the business necessity defense encompasses an employer's rejection of an applicant who fails job-related medical tests because he has a condition that puts him at significant risk of serious injury. Instead, Echazabal would have this Court adopt rigid legal requirements that both Congress and the EEOC considered and explicitly rejected. That plainly is not an acceptable way to interpret the Act.

I. Echazabal faced a significant risk of injury or death. Echazabal and his amici seek to disguise the danger that Echazabal faced, misstating the nature of chronic active Hepatitis C and the deadly consequences of exposing him to hepatotoxic chemicals present in small quantities in the plant and to the risk of a larger leak or spill. In doing so, Echazabal contradicts federal safety standards and authoritative medical literature, which show that he faced imminent and serious danger because of his medical condition. Employers have an unwaivable obligation under OSHA and state laws—on pain of civil and criminal sanctions and punitive damages—to protect *each* employee from known risks to life and health.

Echazabal portrays himself as having a stable medical condition that will not be exacerbated by exposure to hepatotoxins present in the refinery and that will not affect his ability to work for decades, if ever. That, unfortunately, is not the case. Although Hepatitis C is typically asymptomatic for a period of time, up to half of those infected progress to debilitating "cirrhosis and end-stage liver disease," sometimes "within a few years"; Hepatitis C is the leading cause of liver transplants; and 10,000 people die each year from the disease. 1 CECIL TEXTBOOK OF MEDICINE 794, 817 (Goldman & Bennett eds.,

21st ed. 2000); NIDDK, *Chronic Hepatitis C* 1-2, http://www.niddk.nih.gov/health/digest/pubs/chrnhepc/chrnhepc.htm. Even in the least severe cases, chronic active Hepatitis C is a serious disease with "substantial" "morbidity and mortality rates." CECIL TEXTBOOK 794. Echazabal's risk, however, was extreme. At the time of his 1995 application to Chevron he was 50 years old with a "history of heavy alcohol intake." J.A. 122. He thus had all three of the factors—over 40, male, and heavy alcohol use—that are most "associated with the risk of development of cirrhosis" and "liver cancer." CECIL TEXTBOOK 794; NIDDK, *Chronic Hepatitis C* 2. Interferon treatment for "extended periods" had been unsuccessful. J.A. 95, 124. Eight sets of blood tests spanning four years all showed extremely high AST/SGOT and ALT/SGPT levels that indicate, according to the National Institutes of Health, "severe" disease. J.A. 41-44; NIH Consensus Development Conference 21; Pet. Br. 9 n.5. Echazabal claims that, despite all these warnings that he was at serious risk, Chevron should have hired him for a job in which he would face on a daily basis another documented and leading risk factor for liver failure, cirrhosis, and transplantation—further "hepatotoxic exposures." CECIL TEXTBOOK 794, 817.

Echazabal's suggestion (at 7, 43) that he is at no greater danger than anyone else working in Chevron's plant ignores his hypersusceptibilty to "hepatotoxic exposures." CECIL TEXTBOOK 794. Federal NIOSH Guidelines developed in collaboration with OSHA explain that many toxins present in the plant put a person with "pre-existing * * * abnormalities of the * * * liver * * * *at increased risk from exposure*" and that this vulnerability should be assessed through an "initial medical examination." *Occupational Health Guideline for Phenol* 1 (1978), in NIOSH, *Master Index of Occupational Health Guidelines for Chemical Hazards* (emphasis added); see *Guideline for Manganese* 1 (1978) (same); *Guidelines for Naphtha, Octane,* and *Heptane* (employees exposed to these chemicals should be screened for "liver disease" because of their "increased risk"); *Guidelines for Toluene, Naphthalene,*

Ethylenediamine, and *Xylene* (recommending "initial medical examination * * * of the * * * liver" "to detect pre-existing conditions that might place the exposed employee at increased risk"); Pet. Br. 7 n.4 (citing additional NIOSH Guidelines). See WILLIAM ROM, ENVIRONMENTAL AND OCCUPATIONAL MEDICINE 637 (2d ed. 1992) (liver damage stems from "the combined effects of different chemicals" in "workplaces where hepatotoxicants are used"). Because of his chronic active Hepatitis C, very high liver enzyme levels indicative of severe disease, and multiple risk factors for rapid progression to cirrhosis or liver failure, Echazabal was in much greater danger than other workers of illness and death from routine small doses of chemicals or larger exposures from leaks. Just as it was critical that he avoid alcohol because of his increased risk (J.A. 123), it was also critical that he not be exposed to liver toxic chemicals. Unlike a person who refuses to give up fatty foods or quit smoking and hence has a generally lower life expectancy (Resp. Br. 21), Echazabal faced a specific threat of injury and death from essential features of the job he sought.

There was nothing inconsistent in Chevron not demanding in 1993 that Echazabal be removed from the job altogether, as it did in 1996. At that time Echazabal had not been diagnosed with Hepatitis C. He had recently ceased heavy drinking and had only a limited history of blood tests. J.A. 122-123. After his hepatitis diagnosis, Echazabal underwent aggressive Interferon treatment that initially resulted in improvement. J.A. 125. One would expect respondent and his amici to applaud Chevron's willingness to allow Echazabal to continue to work in the plant while it received information on his condition and his response to treatment. By the time of his second application, Chevron's medical examination showed that his condition was not correctable and that he was in serious danger.

Contrary to amicus APHA, Chevron's plant is not unsafe for everyone. Monitoring revealed general compliance with emission standards and only one instance in which a transitory

release of lead during a welding operation exceeded government exposure levels. J.A. 28-29; C.A. App. 161-179. Chevron has established engineering controls and safety facilities and procedures in the coker unit to ensure a safe environment for its workers. Operating the unit in compliance with OSHA standards protects ordinary workers. It cannot protect those who have an "increased risk" from exposure to otherwise safe levels of hepatotoxins due to pre-existing liver disease, still less those like Echazabal who are at the highest end of the risk spectrum. MARK ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW 95 (OSHA standards do not "deal with the problem of susceptible workers"); *Industrial Union*, 448 U.S. at 641.

Five doctors agreed that Echazabal could not safely work in the coker unit because *any* exposure to liver toxins, and the danger of a leak or other accidental release of large quantities of hepatotoxins, would put him at grave risk. Making that decision did not require knowing the precise concentrations of hepatotoxins to which Echazabal would be exposed. As Echazabal's physician unambiguously told Dr. McGill, "of course" Echazabal should not be exposed to hepatotoxins. Chevron's doctors, who were familiar with the facility and who were highly experienced in industrial medicine, consulted with plant personnel experts who knew the nature of the plant helper position and the exposures it would entail. See Pet. Br. 8-11. Chevron's advice came from doctors whose job it was to assure plant safety. Echazabal's doctors, by contrast, are paid witnesses who never worked in the plant, have no safety responsibilities, and whose function is to support a lawsuit. Judge Trott was rightly dismissive of their belated opinions, which were not reasonably available to Chevron when it made its decision, fail to acknowledge Echazabal's numerous risk factors, and contradict medical treatises and federal guidelines recommending testing to detect persons who are hypersusceptible to hepatotoxins because of liver disease.

If expert testimony presented years after the employment decision were enough to cast doubt on Chevron's decision here, an employer could not make a decision even with the advice of multiple experienced physicians—including the employee's own physician. And respondent offers no suggestion for what an employer should do in the event of disagreement among doctors over a life-threatening condition. Other circuits have adopted a more sensible approach that does not require a business to abandon reasonable efforts to ensure employee safety just because some disease assessments are "probabilistic" (Resp. Br. 21): "in the midst of conflicting expert testimony regarding the degree of serious risk of harm or death, the court's place is to ensure that the exclusion * * * of an individual was individualized, reasonably made, and based upon competent medical evidence." *Knapp*, 101 F.3d at 485. Amici American College of Occupational and Environmental Medicine *et al.* explain the impracticalities and injurious consequences of denying employers the ability to rely on reasonable opinions of experienced physicians.

II. Echazabal's claim is barred by the ADA's unambiguous language. Like the Ninth Circuit majority, Echazabal asserts (at 10, 15) that Congress rejected threat to self as a defense when it crafted a "direct threat" provision that imposes "specific limitations" on an employer's available defenses. But Congress provided in Section 12113(b) only that qualification standards "may include" a requirement that a person not pose a direct threat to others. Echazabal has no response to the authorities we cited (at 30-33) showing that the phrase "may include" is non-restrictive, introducing an example and not an exhaustive list. Echazabal's reliance (at 23-24) on Section 12111(9) misstates the language of that provision, which is that a reasonable accommodation "may include" (among other things) "reassignment to a vacant position * * * and other *similar* accommodations." Reassignment to a *filled* position would be the opposite of reassignment to a *vacant* position, not a "similar" accommodation. There is no limiting language of

that sort in Section 12113(b). Nothing in that provision precludes a threat-to-self inquiry authorized elsewhere in the ADA.

Under the Rehabilitation Act, contrary to Echazabal's tangled discussion (at 13-16), threat to self was uniformly recognized by the courts as disqualifying, just like threat to others, regardless of whether the case involved federal or other employment or participation in federally funded programs. See, *e.g.*, *Chiari*, 920 F.2d at 316-317 (city employment); *Mantolete* v. *Bolger*, 767 F.2d 1416, 1422-1424 (9th Cir. 1985) (federal employment); *Doe*, 666 F.2d at 777 (medical school program); *Mikucki* v. *United States Postal Service*, 1986 WL 10516, at *7 (D. Mass. Sept. 22, 1986) (federal employment); see also *Chandler*, 2 F.3d at 1393-1395 (city employment); *Daugherty* v. *El Paso*, 56 F.3d 695, 698 (5th Cir. 1995) (same); *Knapp*, 101 F.3d at 482-485 (private university program). Congress modeled the ADA on these judicial interpretations of the Act and regulations. See *Bragdon*, 524 U.S. at 645; 56 Fed. Reg. 35730; Feldblum, *Medical Examinations and Inquiries Under the ADA*, 64 TEMP. L. REV. at 542-543. There is no indication anywhere in the ADA that Congress intended to eliminate threat to self as a permissible reason for excluding an applicant from employment, as it had been under the Rehabilitation Act—and certainly none in Section 12113(b).

Chevron met the requirements of the "direct threat to self" defense set forth in the EEOC's regulations, to which deference is owed. 29 C.F.R. § 1630.2(r). More pertinently, however, it satisfied the job-relatedness and business necessity defense that is set forth directly in the statute, and repeated three times for emphasis, in Sections 12112(b)(6), 12112(d), and 12113(a). Echazabal has failed to explain how anything in Section 12113(b) confines the more general scope of those provisions, which plainly permit an employer to refuse to hire an applicant who poses a threat to self.

Section 12113(a) provides a general defense for *all* pre-employment "tests" and "qualification standards" that are "job-related and consistent with business necessity," which the EEOC recognizes may include "medical [and] safety" requirements. 29 C.F.R. § 1630.2(q); see 42 U.S.C. § 12112(b)(6). Here, Chevron required blood and other medical "tests," which revealed the grave risk Echazabal would face in the plant helper position. See OXFORD ENGLISH DICTIONARY (2d ed. 1989) (defining "test" as "an instance of testing the * * * physiological, or other qualities and conditions of a human subject"). Section 12113(b), on which Echazabal so heavily relies, does not mention "tests" at all, but relates only to "[t]he term 'qualification standards,'" so it cannot conceivably narrow the generality of the Section 12113(a) defense as it applies to tests. Chevron also satisfied the "qualifications standards" defense. Chevron's written job description—to which the ADA gives special weight (42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(n))—required that plant helper applicants have the "physical ability" to withstand the "environmental demand" of working with hepatotoxic substances. J.A. 65-66. Chevron's doctors reasonably concluded that Echazabal lacked that ability.

Section 12112(d) further provides that it is not "discrimination" of any kind for an employer to require applicants to undergo pre-employment "medical examinations and inquiries" and to "condition an offer of employment on the results." § 12112(d)(3). The employer need show only that the medical examination is "job-related and consistent with business necessity." § 12112(d)(4)(A); see also 29 C.F.R. § 1630.14. Chevron easily satisfied the job-relatedness and business necessity requirements (as we show in Section III below) when its doctors complied with NIOSH guidelines and examined applicants to determine whether they were at "increased risk" from hepatotoxic exposures, and when it denied employment to Echazabal because its doctors concluded that he fell into the highest risk category. Congress explained that the purpose of the "medical examination" provisions was precisely to allow

employers to determine whether an applicant was unfit for a "safety * * * sensitive positio[n]," and that Congress did not intend "to override any legitimate medical standards or requirements." H.R. Conf. Rep., 1 Leg. Hist. 64-65. Clearly, Congress did not believe that medical examinations to ensure safety constituted impermissible "paternalism."

Our analysis does not make Section 12113(b) mere "surplus." Resp. Br. 25. Congress in the ADA treated threat to others separately in Sections 12113(b) and 12111(3)—provisions that concern only "qualification standards" that screen out persons who pose a threat to others. Congress left medical examinations, tests, and other qualification standards to be analyzed under the ordinary business necessity yardstick of Sections 12112(d) and 12113(a). Section 12113(b) reflects a desire to assure members of the public that the ADA would not jeopardize their safety. It also responds to concerns that employee fears may pressure an employer to deny employment to persons stereotypically perceived by co-workers as posing a threat to them. The heightened standard of the "direct threat" provision protects disabled employees from qualification standards based on prejudice or irrational fears of contagion and other dangers, while leaving professional medical judgments that a person is a safety risk to be analyzed under the business necessity test. The statute cannot be rewritten, however, to make the "direct threat" provision override the general business necessity defense expressly applicable to every other kind of job-related "test," "qualification standard," "selection criteri[on]," and "medical examination."

III. Chevron's decision was supported by business necessity. Chevron's denial of employment to Echazabal fits easily within the job-relatedness and business necessity defense that applies to pre-employment medical examinations, tests, and qualification standards. Disability advocates preferred a more demanding standard that appeared in an earlier bill—"necessary and substantially related to the ability of the individual to

perform the essential functions of the particular employment position." But the business community and President Bush opposed that formulation. Congress accordingly rejected it and adopted instead the requirement that medical tests and qualification standards be "job-related and consistent with business necessity," a formulation borrowed from Title VII. Feldblum, *supra*, 64 TEMP. L. REV. at 534-539, 546-547; 42 U.S.C. §2000e-2(k). Disability advocates then lobbied the EEOC to exclude threat to personal safety from the scope of the business necessity defense by regulation, contending that consideration of harm to self would be "paternalistic" and predicated on "negative stereotypes." 56 Fed. Reg. 35730 (1991). But the EEOC rejected that argument too as inconsistent with Congress's intent. *Ibid.* Courts should not adopt legal standards that Congress and the EEOC have disapproved.

Employment decisions are job related and supported by business necessity when they comply with NIOSH guidelines, achieve efficient staffing, maintain employee morale, avoid damaging publicity, prevent OSHA and state law worker safety citations and possible criminal prosecution, and minimize tort liabilities. Congress understood that it is "acceptable to deny employment to an applicant" who "poses a significant risk to * * * *property*." S. Rep., 1 Leg. Hist. 125; see also H.R. Rep. Pt. 2, 1 Leg. Hist. 329. Clearly, Congress recognized that business necessity is a flexible concept. It can hardly be supposed that preventing the loss of a worker's life, with all that entails for the enterprise, is a lesser business concern than preventing damage to machinery or other property. "Safety is our business" is not merely a slogan. It reflects the experience of American companies that workplace safety is important to productivity and profitability, meeting ethical responsibilities, and preserving employee relations. Congress would scarcely have included the elaborate provisions of Section 12112(b) authorizing "medical examinations" and employment decisions based on their "results," if it had shared Echazabal's view that looking after worker safety is mere paternalism.

The business necessity defense was well established under Title VII at the time of the ADA's adoption. It was expounded in a long line of this Court's decisions, and was well understood to be "lenient" in comparison to BFOQ standards. *Johnson Controls*, 499 U.S. at 198. This Court repeatedly held that an employer's refusal to hire satisfied the business necessity standard if it "significantly served"—even though it was not "require[d]" by—"*legitimate employment goals of safety and efficiency*" and bore a "'manifest relationship to the employment in question.'" *Beazer*, 440 U.S. at 587 & n.31 (emphasis added). This Court held in *Furnco Constr. Corp.* v. *Waters* that avoiding "loss of production," loss of "reputation," and maintaining "safe and efficient operation of [the] business" were factors showing the business necessity of a hiring practice. A practice need only "be reasonably related to the achievement of some legitimate purpose" to satisfy the business necessity test. 438 U.S. 567, 571-576 (1978). And because courts "are generally less competent than employers" to assess the need for "business practices" and "hiring procedures," they should not "substitut[e their] own judgment" as to appropriate employment criteria. *Id.* at 574, 578. See also *Dothard*, 433 U.S. at 331-332 & n.14 (an employer may "test * * * directly" for any characteristic that is "necessary to safe and efficient job performance"); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432-436 (1971) (to ensure an applicant is "fit for the job," an employer may use "testing or measuring procedures" to "measure the person for the job" because that "fulfill[s] a genuine business need"); *Watson* v. *Fort Worth Bank*, 487 U.S. 977, 997-998 (1988) ("the 'business necessity' or 'job relatedness' defense" is made out by showing "legitimate business reasons" for a practice; it is "obvious" that "'safety and efficiency'" goals are sufficient). Echazabal has supplied no reason to believe that Congress, when it imported the business necessity defense into the ADA, had in mind a more stringent standard.

We have shown (at 24-28), and the United States agrees (at 17-19 & n.7), that hiring a person who would be at significant

risk on the job would expose an employer to OSHA and equivalent state charges, tort suits, and even criminal prosecution. Echazabal's supposition (at 37) that an employer who "discloses the relevant risks" to a hypersusceptible applicant "will face no prospect of liability" is mere wishful thinking. The OSH Act's purpose is "'to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.'" *Chao* v. *Mallard Bay Drilling*, 122 S. Ct. 738, 744 n.9 (2002). There is no question that OSHA may charge an employer with violating the Act's general duty clause if it fails to protect a worker from "recognized hazards" likely to cause "death or serious physical harm." 29 U.S.C. § 654(a); *McKie Ford, Inc.* v. *Secretary of Labor*, 191 F.3d 853 (8th Cir. 1999). And it could be alleged in light of Echazabal's history, Chevron's physicians' warnings, and NIOSH guidelines that exposure to hepatotoxins is a "recognized hazard." The employer's duty under the OSH Act is not waivable, and *employee* consent to the risk would not foreclose an *OSHA* enforcement action. *National Realty Co.* v. *OSH Review Comm'n*, 489 F.2d 1257, 1266 n.36 (D.C. Cir. 1973); see *EEOC* v. *Waffle House*, 122 S. Ct. 754, 762-766 (2002); *Brooklyn Sav. Bank* v. *O'Neil*, 324 U.S. 697, 704-706 (1945). A tort plaintiff would also contend that any waiver was against public policy and unlawful. Echazabal concedes (at 39 n.15), moreover, that state courts routinely hold that federal laws like the OSH Act and ADA do not preempt state criminal prosecutions. Echazabal's prediction (at 39) that an employer would not be prosecuted or sued if it took "all reasonable steps to safeguard" employee health begs the question whether tort plaintiffs, enforcement agencies, and juries would think it reasonable for an employer to send a person it knows to have multiple risk factors for rapid progression to liver failure into a job involving daily hepatotoxic exposures. Under the business necessity standard, that is not a chance employers are required to take.

IV. The ADA authorizes individual tests. Recognizing that the business necessity defense allows employers to reject

applicants to ensure plant safety and efficiency, Echazabal contends (at 26-32) that under the ADA, as under Title VII, the defense is limited to cases of "disparate impact" in which facially neutral qualification standards incidentally disadvantage a protected group. According to Echazabal, the defense does not apply to "disparate treatment." An employer can justify disparate treatment under Title VII only if it satisfies the more stringent "bona fide occupational qualification" defense. There is no BFOQ defense under the ADA, so it must be the case, Echazabal asserts, that disparate treatment is never proper under the ADA. Echazabal points to *no* statutory text, legislative history, or caselaw support for this strained interpretation.

Echazabal's effort to narrow the scope of the ADA's business necessity defense ignores a crucial difference between race, gender, and age, on the one hand, and physical infirmity on the other. While employment action based on race is almost never justifiable, and action based on gender or age is almost always invidious and hence justifiable only if an employer satisfies the rigorous requirements of the BFOQ defense, *disability conditions are far more likely to correlate directly to safety and efficiency considerations in the workplace*. That practical distinction led Congress to strike a different balance between creating employment opportunities and meeting business needs in the ADA than in the civil rights laws, as shown by the lack of a BFOQ requirement in the ADA, by Congress's repeated provision instead of a flexible and broadly applicable "business necessity" defense (§§ 12112(b)(6), 12112(d)(4)(A), 12113(a)), and by Congress's specific authorization of pre-employment medical examinations and tests to detect medical conditions that create safety risks and undermine efficient business operations. §§ 12112(d), 12113(a). See, *e.g.*, Statement of President Bush, 1990 U.S.C.C.A.N. at 602 (ADA strikes a "careful balance" between "the rights of individuals with disabilities and the legitimate interests of business"); H.R. Conf. Rep., 1 Leg. Hist. 64-65 (Congress did "not intend for this Act to override any legitimate medical standards or

requirements established by * * * employers for applicants for safety * * * sensitive positions").

Echazabal's attempt to superimpose Title VII's distinction between disparate impact and disparate treatment upon the ADA is not compatible with the ADA's language and structure. The ADA expressly permits an employer to require that an applicant pass a "medical examination" and to deny employment based "on the results" of that examination if doing so is "job-related" and a "business necessity." § 12112(d)(3), (4). Echazabal (at 26-27) regards employment decisions based on individualized determinations that the candidate has a disqualifying medical condition as "disparate treatment," so Section 12112(d) completely refutes his contention that disparate treatment cannot be justified under the ADA as "job-related and consistent with business necessity." So does the Section 12113(b) direct threat defense, which Echazabal concedes (at 32) permits "disparate treatment."

Echazabal's sole prop for his argument is his demonstrably incorrect claim (at 28) that "the Section 12113(a) 'qualification standards' defense" reaches "only" criteria that "'screen out or tend to screen out'" disabled persons, which is supposedly "language of discriminatory effect rather than disparate treatment." But Section 12113(a) is on its face broader than Echazabal pretends. It extends not only to "qualification standards," but also to individualized "tests," such as the medical tests that Chevron relied on here and that are specifically authorized by Section 12112(d). In addition, it expressly authorizes not only standards and tests that "screen out or tend to screen out" disabled persons, but also those that "*otherwise deny* a job or benefit to an individual with a disability." That all encompassing language plainly covers denials that result from disparate treatment as well as from the application of neutral standards.

Contrary to Echazabal (at 29), EEOC regulations do not "limit" the business necessity defense to cases of discriminatory

impact—nor could they reasonably do so, given the plain meaning of the statute. 29 C.F.R. § 1630.15(b)(1) mirrors the language of ADA § 12113(a), making the business necessity test applicable to *any* test or standard that denies employment as a result of disability. Though 29 C.F.R. § 1630.15(c) does refer to disparate impacts, it lists only "some * * * potential defenses" and is "not intended to be exhaustive." 29 C.F.R. Part 1630, App., § 1630.15. Section 1630.14(c) separately permits individualized medical examinations that are "job-related and consistent with business necessity."

Beyond the obvious legal infirmities in the scheme Echazabal would superimpose on the ADA, he is also incorrect to claim (at 26-27) that Chevron engaged in "classic * * * disparate treatment" by declining to hire him "because of" disability. Chevron refused to hire Echazabal because medical examinations and tests showed that he would be at grave risk of serious injury or death from exposure to hepatotoxins in the coker unit—a decision that would have been the same regardless of whether Echazabal's condition was a "disability" within the meaning of the ADA. Chevron's criterion was "safety," not "disability." In fact, Chevron could not reliably determine at the time of its decision whether Echazabal was "disabled."

Chevron focused the medical tests on a neutral, safety-based qualification standard that precluded from employment in the coker unit not anyone with a "disability," but anyone who could not satisfy the "physical ability" and "environmental demand" of working in an environment containing specified "contaminants and chemicals," including liver-toxic "hydrocarbon liquids & vapors" and "solvents." J.A. 65-66. Thus, even on Echazabal's incorrect theory that the business necessity defense is limited to cases in which a neutral qualification standard has a disparate impact on persons with disabilities, it applies here.

Dothard and *Johnson Controls* provide further support for Chevron's employment decision. In *Dothard*, this Court

recognized that the "touchstone" for "business necessity" is that an employment practice assures "safe and efficient job performance." It stated that an employer may use "a test for applicants that measures * * * directly" whether they can safely and efficiently perform the job. 433 U.S. at 331-332 & n.14. Chevron's medical examination conformed to that model. The Court went on to approve an explicitly gender-based regulation denying women certain safety-sensitive prison positions, on the ground that the employer had established that male gender was a BFOQ—"an extremely narrow exception" to the non-discrimination rule that is considerably more demanding than business necessity. It was in the context of its discussion whether gender is a *BFOQ*, not in the context of the business necessity defense, that this Court stated that women "[i]n the usual case" can choose whether "a particular job is too dangerous." *Id.* at 334-335. Read as a whole, *Dothard* confirms that an individualized medical examination to determine whether an applicant can safely do the job (not whether he is "disabled"), like that used by Chevron, passes muster as a business necessity.

In *Johnson Controls* this Court agreed with the EEOC that a sweeping, facially discriminatory prohibition on employing *any* woman of childbearing age from jobs working with lead, designed to protect her fertility and fetuses, did not satisfy the BFOQ analysis. The "restrictive" BFOQ standard was not met because lead also harmed male fertility, the Pregnancy Disability Act explicitly barred discrimination based on the potential for pregnancy, harm to a woman's fertility or fetus would not interfere with her ability to do the job, and OSHA had specified procedures for mitigating the risk short of exclusion from the job. 499 U.S. at 198-204, 208. Even under the BFOQ standard, the Court recognized, "safety" problems that "actually interfer[e] with the employee's ability to perform the job" would suffice. *Id.* at 204; see also *id.* at 213 (even under the BFOQ defense, avoiding "costs" and "injury * * * to employees" were valid "business concerns") (White, J., concurring); *id.* at 224 (Scalia, J., concurring). Unlike reduced fertility,

serious liver disease exacerbated by hepatotoxic exposures in the workplace would obviously interfere with Echazabal's ability to do the plant helper job.

V. No accommodation was reasonably available. Some amici—tellingly, not Echazabal himself—suggest that Chevron might have made some "reasonable accommodation" for Echazabal's liver condition. But Echazabal did not ask Chevron for an accommodation at the time of Chevron's decision, thereby failing to engage in the "interactive process" the statute requires. *E.g.*, *Loulseged* v. *Akzo Nobel Inc.*, 178 F.3d 731, 735-736 (5th Cir. 1999); 29 C.F.R. § 1630.9. Furthermore, Chevron tendered evidence in support of its motion for summary judgment that no accommodation was possible that would permit Echazabal safely to perform the job. J.A. 34, 45, 49. As the district court held (J.A. 184 n.6), Echazabal never asserted in opposition to Chevron's motion that the company "could or should" have made an accommodation, even though "[t]he employee retains at all times the burden of persua[sion] * * * that reasonable accommodations were available." *LaChance* v. *Duffy's Draft House*, 146 F.3d 832, 836 (11th Cir. 1998). That was not an accidental omission. Echazabal did raise the accommodation issue as to his employer, Irwin. J.A. 184 n.6. It is too late now for Echazabal to argue that a reasonable accommodation was available for his condition and, indeed, he does not attempt to do so. See *Reno* v. *Koray*, 515 U.S. 50, 55 n.2 (1995).

The suggestion of Echazabal's physician witnesses that Chevron could monitor his medical condition is no accommodation at all. Chevron monitored his condition for three years, during which time Interferon treatment failed and his enzyme levels confirmed the existence of severe and incurable disease. Monitoring could not eliminate the danger that every moment spent exposed to hepatotoxins put Echazabal at incremental risk. See *Gonzales* v. *New Braunfels*, 176 F.3d 834, 838 (5th Cir. 1999) (retesting that does not "eliminate the

inherent safety risk" posed by the employee's condition is not a reasonable accommodation).

VI. Echazabal bore the burden of proof. Chevron's only burden under the ADA was to show that its medical examinations, tests, and qualification standards were job-related and consistent with business necessity—a burden it easily met. 42 U.S.C. §§ 12112(d)(4)(A), 12113(a). At that point, the burden shifted to Echazabal to prove that it was improper for Chevron to have relied on the medical opinions in determining that he could not safely work in the plant helper position. See *Beazer*, 440 U.S. at 587 n.31 (once the employer shows that it acted to further "legitimate employment goals of safety and efficiency," the "ultimate burden" shifted to the plaintiff to prove a violation); *Furnco*, 438 U.S. at 578 (the employer's showing that its action "is reasonably related to the achievement of some legitimate goal" shifts the burden to the plaintiff to prove that action was nevertheless discriminatory); *Watson*, 487 U.S. at 997-998 (an employer must show "that its employment practices are based on legitimate business reasons"; once it does so, "the ultimate burden of proving" discrimination "remains with the plaintiff at all times"). Because medical examinations to determine safety are not "discrimination" at all according to Section 12112, a plaintiff complaining about such an examination clearly bears the burden to prove that the examination was improper in order to establish that he was "discriminated" against because of his disability. Chevron made out, and Echazabal did not rebut, the business necessity defense.

Echazabal's claim *also* fails because he did not prove as an initial matter that he was a "qualified individual" within the ADA's protection. Neither respondent (at 45) nor the United States (at 24) disputes that Echazabal must prove that he is "qualified" under Section 12112(a). Both contend, however, that this does not require him to show that he can perform job tasks safely. That is not a tenable argument.

The Act defines a "qualified individual" as someone who "can perform the essential functions of the employment position." 42 U.S.C. § 12111(8). That language demands a forward-looking inquiry into the individual's capacity to carry on essential tasks. A person cannot reasonably be deemed capable of performance if he is unusually susceptible to serious injury or death from the job. Even Echazabal acknowledges (at 48) that an employee "'cannot' perform essential job tasks" where "imminent death or injury will prevent him from completing those tasks." Reading the term "can perform" narrowly to mean "perform right now," however, Echazabal suggests that this limitation applies only when "an employee seeks a job in which he will *immediately* die or suffer serious injury."

This case illustrates the absurdity of Echazabal's approach. Though medical science did not allow Chevron to predict that Echazabal would be grievously injured or killed on his very first day on the job, it did show that Echazabal had degenerative liver disease and was in a high risk category, susceptible to catastrophic liver failure *at any time*. J.A. 83-84. In these circumstances, Echazabal failed to show that he could perform the plant helper job on an ongoing basis. See *Chiari*, 920 F.2d at 317 (employee with Parkinson's disease was not qualified for job where he posed "a substantial risk" to himself and others because "disease was degenerative," meaning "physical exertion would become progressively more dangerous to him").

The United States concedes (at 26) that in some cases "there will be substantial overlap between the issue whether an individual is qualified and whether the individual poses a threat to health and safety," citing "firefighters" and "pilots" as "examples" of workers raising "paramount" safety concerns. Chevron's plant helper position is also such a job. Chevron's written job description is entitled to consideration in determining the position's "essential functions." 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(n)(3)(ii). That description made clear that a plant helper must be able to withstand exposure to hepatotoxic

chemicals. Daily exposure is "integral to [the] job," and someone with Echazabal's exceptional vulnerability to exposure cannot satisfy the job's "essential functions." See *Amego*, 110 F.3d at 143-144 (treating threat to heath and safety as part of question whether employee was "qualified" where the safety risk arose "in the context of a core function of the job"); *Borgialli*, 235 F.3d at 1295.

Echazabal seeks to avoid this conclusion by citing (at 49) his *historical* ability to work under similar conditions. But Hepatitis C is ordinarily asymptomatic for several years. And past is not prologue in anticipating its development. Echazabal himself concedes (at 47) that the relevant inquiry is not whether he *has* performed the job; what matters is his current medical condition. See also U.S. Br. 24. Echazabal was not diagnosed with Hepatitis C until 1993. By the time Chevron refused to hire him in early 1996 lengthy treatment with Interferon had failed, a history of eight liver tests showed his disease was "severe," and it could be concluded, given his plethora of risk factors, that working with hepatotoxins would put him at high risk for liver failure, cirrhosis, liver cancer, transplant, and death. *Supra*, Section I. That, not his past work, was the reality Chevron had to take into account.

There is no merit to the claim that employees should not be required to show that they can perform a job safely because the employer has "superior information and knowledge about workplace requirements and operations." Amicus Br. of National Council on Disability 22. Chevron set forth its job requirements and conditions in the job description and, during the course of discovery, Echazabal's experts examined the plant and reached their own conclusions about its environment. Echazabal knew his own work record and medical diagnosis.

Requiring Echazabal to prove he is "qualified" to perform the job's essential tasks without immediate danger to himself conforms to judicial and regulatory interpretations of the Re-

habilitation Act, upon which Congress based the ADA. See Pet. Br. 46-47. The United States admits (at 27-28) that "concerns about threats to self * * * are considered in the determination whether a plaintiff is a 'qualified individual'" under the Rehabilitation Act. Prior to passage of the ADA, the EEOC and the courts consistently read the term "qualified" in the Rehabilitation Act to subsume questions of health and safety. 43 Fed. Reg. 12295; 29 C.F.R. § 1614.203(a)(6); *Arline*, 480 U.S. at 287 n.16; *supra*, p. 6 (citing cases).

Echazabal argues (at 45) that if an ADA plaintiff must prove he can perform essential functions safely to be "qualified," Section 12113's "defenses" are superfluous. The ADA, however, is full of repetitions and redundancies. As we explained in our opening brief (at 44), the Act makes multiple uses of the concept of "reasonable accommodation," for example, including it both as an element of the plaintiff's prima facie case and as part of the employer's "undue hardship" defense. See also Amicus Br. for Chamber of Commerce 26-28 & n.11. Echazabal's proposed reading will do nothing to eliminate redundancy in the ADA, and linguistic overlap between Sections 12112 and 12113 provides no ground for rejecting a reading otherwise consistent with the Act's language and adoption of Rehabilitation Act standards. Though Congress divided the elements of an ADA claim and defenses among various sections of the statute, this structure does not alter the fact that, as under Title VII, a plaintiff "clearly [has the] ultimate burden of proving a violation," which requires him to prove he was a qualified person who was discriminated against because of disability. *Beazer*, 440 U.S. at 587 n.31. Echazabal cannot satisfy that ultimate burden without proving that he could safely work in the coker unit.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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